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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CLIFTON WHITLEY, ET AL., *Appellants*,

v.

JOHN BELL WILLIAMS, Governor of the State of Mississippi, ET AL., *Appellees*.

On Appeal From the United States District Court for the Southern District of Mississippi (Three Judge Court)

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Mississippi is not yet reported. It is reprinted in Appendix A. An earlier opinion in this case is reported *sub nom. Whitley v. Johnson,* 260 F. Supp. 630 (S.D. Miss. 1966).

JURISDICTION

This is a suit to enforce the provisions of section 5 of the Voting Rights Act against the use by Mississippi of a voting practice or procedure different from that in effect on November 1, 1964.

The judgment from which the appeal is taken was entered by the United States District Court for the Southern District of Mississippi on October 31, 1967, and the Notice of Appeal was filed in that court on October 31, 1967.

The jurisdiction of the court below to hear the case was based on 28 U.S.C. §§ 1343(3), 1343(4), 2201, and 2202, and 42 U.S.C. §§ 1971(d), 1973c, and 1973j(f). A three-judge court was required by 28 U.S.C. § 1973c and in addition by 28 U.S.C. § 2281, since the suit sought to enjoin enforcement of a state statute in violation of the Supremacy Clause, Art. VI, of the Constitution of the United States. *Kesler* v. *Department of Public Safety,* 369 U.S. 153 (1962).

The jurisdiction of the Supreme Court to hear a direct appeal in this case comes from the explicit terms of the statute under which this case arose, 42 U.S.C. § 1973c, and from 28 U.S.C. § 1253, which permits direct appeals from judgments in cases required by Act of Congress to be heard by three-judge district courts.

STATUTES INVOLVED

The statutes involved in the case are:

(1) section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c:

> "Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [1973b(a)] are in effect shall enact or

seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court."

(2) section 3260 of the Mississippi Code of 1942, as amended in 1966 by House Bill No. 68. This is the statute which appellants submit is barred by section 5 of the Voting Rights Act; its text is set forth in Appendix B, in both its prior and present versions.

QUESTIONS PRESENTED

1. Whether a state statute which makes it more difficult for voters to choose independent candidates by (a) providing that one who votes in a party primary may not be an independent candidate for public office, (b) increasing ten-fold the number of voters who must sign an independent candidate's petition and requiring that each voter personally sign his name and list his precinct, and (c) making the qualification date for candidates substantially earlier, is a statute dealing with "a voting qualification or prerequisite for voting, or standard, practice or procedure with respect to voting" within the meaning of section 5 of the Voting Rights Act of 1965.

2. Whether such a statute violates section 5 of the Voting Rights Act, which provides that no statute within the Act can be enforced in the absence of a declaratory judgment that the statute is free of racial discrimination or a sixty-day acquiescence by the Attorney General, neither of which occurred here.

3. Whether, if the answer to the first two questions is "yes", those 1967 Mississippi elections in which voters were deprived of the right to vote for candidates who failed to qualify solely because of the enforcement of the new tests can be allowed to stand.

STATEMENT OF THE CASE

Mississippi is subject to the Voting Rights Act of 1965, 42 U.S.C. § 1973.[1] Under section 5 of that Act, 42 U.S.C. § 1973c, if it seeks to enforce "any voting qualification or prerequisite to voting, or standard,

[1] This and several other matters have been stipulated; the terms of the stipulation are attached to the opinion of the court below, reprinted herein as Appendix A.

practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," it must obtain a declaratory judgment that the new procedure "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." The State may also enforce the procedure if it is submitted to the Attorney General of the United States and he fails to object within sixty days.

In 1966, the Mississippi Legislature amended section 3260 of the Mississippi Code of 1942—which provides how a candidate for state office gets a place on the ballot—to make it more difficult for independent candidates to qualify for election by the voters:

(1) No person who has voted in a primary election may thereafter be placed on the ballot as an independent candidate in the general election;

(2) the numbers of signatures of qualified electors needed on the petition of an independent candidate is substantially increased, in most cases ten-fold;

(3) each qualified elector must personally sign the petition for an independent candidate and must include his polling precinct and county;

(4) the time for filing a petition as an independent candidate is now substantially earlier than it was previously.

It has been stipulated that the State of Mississippi neither obtained the declaratory judgment required by section 5 of the Voting Rights Act nor submitted the new test to the Attorney General before putting it into effect. See Appendix A.

Appellants were prospective independent candidates for state office in 1966 who were kept off the ballot, although they satisfied the pre-1966 provisions of section 3260, because they did not have the number of signatures required by the 1966 amendment to section 3260.[2] On October 20, 1966, appellants filed a class action on behalf of themselves and all others similarly situated, requesting an injunction against enforcement of the new procedures of section 3260 on the ground that section 5 of the Voting Rights Act barred such enforcement and that the new procedures violated the Fourteenth and Fifteenth Amendments. A three-judge district court exercised its equity jurisdiction and ordered appellants placed upon the ballot for the 1966 election, but without reaching any of the constitutional or statutory issues presented by the suit. *Whitley* v. *Johnson,* 260 F. Supp. 630 (S.D. Miss. 1966).

In 1967, the Secretary of the State of Mississippi applied the procedures of new section 3260 to bar other members of the class represented by appellants. The appellants' memorandum of law submitted in the court below lists fifteen examples of candidates kept off the ballot.[3] These examples show that each of the procedures of the new section 3260 described above had the effect of keeping at least one candidate off the ballot in the Mississippi general elections of 1967.[3]

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[2] And in two cases on the additional ground that the petitioner had *run* in the primary, even though the new § 3260 refers only to those who have *voted* in the primary.

[3] 1. Mrs. Fannie Lou Hamer, Sunflower, State Senate, voted in primary.
2. Philip McKinney, DeSoto, Supervisor Beat 4, filed too late.
3. Dan Lofton Mason, Hinds, Supervisor Beat 2, voted in Democratic Primary.
4. L. C. Leach, Hinds, J. P. Beat 2, Post 1, voted in Democratic Primary.

As a result appellants moved for a permanent injunction against enforcement of the new procedures of section 3260, and in order to obtain relief in time for the 1967 elections, agreed to stipulate that the only issue before the court was whether the Voting Rights Act barred enforcement of section 3260. As so stipulated the court below took briefs and denied the injunction on the ground that the new section 3260 did not impose "a voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" within the meaning of section 5 of the Voting Rights Act:

> "The Mississippi statute under consideration (House Bill 68) is directed solely to the qualifications of candidates, whereas Section 5 has reference to the qualifications of voters. We do not believe that the Mississippi statute is of the kind

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5. Rev. J. L. Brown, Hinds, Supervisor, Beat 3, voted in Democratic Primary.
6. Johnnie Ross, Hinds, J. P. Beat 3, voted in Democratic Primary.
7. John Daniel Wesley, Holmes, J. P. Beat 5, voted in Democratic Primary.
8. George Raymond, Madison, State Rep. Post 1, insufficient signatures on petition—no precincts.
9. Bennie L. Thompson, Madison, Supervisor Beat 3, insufficient signatures on petition—no precincts.
10. Ellis Saddler, Madison, J. P. Beat 3, Post 1, insufficient signatures on petition—no precincts.
11. Floyd Moore, Madison, J. P. Beat 3, Post 2, insufficient signatures on petition—no precincts.
12. H. L. Gray, Sr., Madison, Constable Beat 3, Post 1, insufficient signatures on petition—no precincts.
13. Hubert McDonald, Madison, Constable Beat 3, Post 2, insufficient signatures on petition—no precincts.
14. Rev. L. D. Coleman, Quitman, Supervisor Beat 3, filed too late.
15. Rev. Sammy Rash, Bolivar, State Rep. Post 2, no post listed on petition.

which Section 5 of the Voting Rights Act of 1965 was designed to prevent. The Mississippi statute under attack does not appear on its face to be one designed or intended to effect a discrimination or qualification relating to the person or voting rights of the individual. The Act does not deal with voting but deals with elections, and more particularly the candidates; therefore, it does not impinge upon Section 5 of the Voting Rights Act of 1965."

A motion presented to Mr. Justice Black for an injunction pending appeal in this Court was denied, and the 1967 general elections were held without the people of the State of Mississippi being permitted to vote for a large number of candidates who qualified under the tests of old section 3260 but not under those of the 1966 amendment. This appeal followed.

THE QUESTIONS ARE SUBSTANTIAL

Those states, including Mississippi, which have traditionally deprived Negroes of the right to vote have displayed great ingenuity in raising new barriers of discrimination to circumvent successive checks imposed by Congress and the courts.[4] In passing the Voting

[4] "The course of subsequent Fifteenth Amendment litigation in this Court demonstrates the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote. Grandfather clauses were invalidated in Guinn v. United States, 238 U.S. 347, and Myers v. Anderson, 238 U.S. 368. Procedural hurdles were struck down in Lane v. Wilson, 307 U.S. 268. The white primary was outlawed in Smith v. Allwright, 321 U.S. 649, and Terry v. Adams, 345 U.S. 461. Improper challenges were nullified in United States v. Thomas, 362 U.S. 58. Racial gerrymandering was forbidden by Gomillion v. Lightfoot, 364 U.S. 339. Finally, discriminatory application of voting tests was condemned in Schnell v. Davis, 336 U.S. 933; Alabama v. United States, 371 U.S. 37; and Louisiana v. United States, 380 U.S. 145." South Carolina v. Katzenbach, 383 U.S. 301, 311-12 (1966).

Rights Act of 1965, therefore, Congress not only barred these states from using "any test or device" as a prerequisite for voting, but also prohibited them from making any changes in their voting and election laws without first satisfying federal authorities that the changes would not have the purpose or effect of discriminating against Negroes.

Since the passage of the Voting Rights Act, the State of Mississippi alone has passed at least 18 voting or election laws which are arguably subject to the Act's requirement of advance clearance.[5] In not a single case has the State sought to discharge its burden of proving that the new voting practice or procedure is free of racial discrimination. The need for a determination of what types of statutes are covered by section 5 is clear.[6]

The Mississippi statute involved in this case, House Bill No. 68, limited voters' opportunities to vote for independent candidates by making it more difficult for such candidates (who would generally be Negroes) to get on the ballot, and did so in part by provisions which limited the class of voters eligible to vote in party primaries and which required that signers of independent candidates' petitions sign personally.

The court below held that this statute was not subject to section 5 of the Voting Rights Act because it "does not deal with voting but deals with elections."

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[5] See Appendix C.

[6] Two other cases seeking to enjoin enforcement of Mississippi statutes on the ground that they violate section 5 of the Voting Rights Act are now on appeal in this Court. *Fairley* v. *Patterson*, No. 1058, October Term 1967; *Bunton* v. *Patterson*, No. 1059, October Term 1967.

Appellants submit that the Voting Rights Act does not permit such a distinction and that it is precisely statutes like House Bill No. 68 which Congress intended to subject to federal scrutiny for discriminatory purpose or effect.

The right to vote protected by the Act is not merely an abstract right to cast a ballot, but includes all steps necessary to make one's vote effective. The all-inclusive coverage of the Act is confirmed not only by the legislative history, *see* Senate Hearings 191-92, but by the definition of voting found in section 14(c)(1):

> "The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to . . . casting a ballot, and having such ballot counted. . . ." 42 U.S.C. § 1973*l*.

Moreover, since the Voting Rights Act was an exercise of Congress' power (under the second clause of the Fifteenth Amendment) to enforce the voting guarantee of that Amendment, the Act's coverage is as broad as that of the Fifteenth Amendment itself. And this Court's Fifteenth Amendment cases make it clear that "[t]he Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939).

Thus, the right to vote has been held to include choosing candidates in party primaries[7] or in pri-

[7] *Nixon* v. *Herndon*, 273 U.S. 536 (1927); *Nixon* v. *Condon*, 286 U.S. 73 (1932).

maries of private political clubs,[8] whether these primaries were administered by the State or not,[9] as well as redistricting to deny Negroes the vote in a particular municipality [10] and extending terms of incumbent officials to curtail voting opportunities.[11] The right to vote comprises all these steps because each is an "integral part of the procedure of choice" of representatives. *United States* v. *Classic*, 313 U.S. 299, 318 (1943).

In *Classic* this Court went on to say that the primary "involves a necessary step in the choice of candidates for election as representatives." 313 U.S. at 320. Choosing independent candidates, the subject of the Mississippi statute involved here, is in effect the independent voter's primary, and this Court should be slow to hold that the Voting Rights Act was not intended to protect Negro voters against a discriminatory scheme which is simply the counterpart of those which came before this Court so frequently a generation ago. Years of white domination of party primaries convinced many Negroes that their votes could not be effectively cast in such primaries, but only on behalf of independent candidates. The State of Mississippi has responded by raising the already discriminatory bar-

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[8] *Terry* v. *Adams*, 345 U.S. 461 (1953); *Rice* v. *Elmore*, 165 F.2d 387 (4th Cir. 1947); *Baskin* v. *Brown*, 174 F.2d 391 (4th Cir. 1949).

[9] *Smith* v. *Allwright*, 321 U.S. 649 (1944). See *United States* v. *Classic*, 313 U.S. 299 (1943).

[10] *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

[11] *Sellers* v. *Trussell*, 253 F.Supp. 915 (M.D.Ala. 1966).

riers to voting for independent candidates.[12] While this route to effective voting is not completely cut off by new section 3260, the statute does deal with voting and that alone, even without the strong suggestion here of a purpose to abridge Negroes' voting rights, is enough, under section 5, to require the state to submit the statute to federal scrutiny before enforcing it.

The only case dealing with the coverage of section 5, *Sellers* v. *Trussell*, 253 F. Supp. 915 (M.D. Ala. 1966), supports appellants' arguments here. There the Alabama legislature had extended for two years the terms of office of officials who had been elected at a time when Negroes were being illegally deprived of the right to vote. According to Judge Rives, the statute both violated the Fifteenth Amendment and came within section 5 since "to freeze elected officials into office is, in effect, to freeze Negroes out of the electorate."[13] If depriving Negroes of opportunities to

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[12] In contrast to the requirements for independent candidates a party holding a primary automatically gets its candidates on the ballot, no matter how many votes were cast in the primary.

The onerousness of the signature requirements of new section 3260 was recognized by the legislature itself in connection with the 1968 special election to fill the Congressional seat vacated by now-Governor John Bell Williams. Heretofore, special elections were governed by section 3260, so that all candidates—not just Negroes or independents—would be subject to its signature requirements. Whereupon the legislature, having in new section 3260 increased the number of signatures required for an independent candidate to 2000, now deemed it expedient to make an exception for *special elections* and lowered the number of signatures required to 1000. House Bill No. 19, amending section 3304 (Jan. 15, 1968).

[13] 253 F.Supp. at 917. Judge Johnson would not have reached the question of the applicability of section 5 of the Voting Rights Act, but concurred in holding that the Alabama statute violated the Fifteenth Amendment. Since the language of both the Fifteenth

vote, and more particularly to vote for candidates of their choice, by making elections less frequent comes within section 5, it should follow that depriving Negroes of opportunities to vote for candidates of their choice by making it difficult for these candidates—likely to be Negroes—to be on the ballot likewise comes within section 5.

As to two of the provisions of the new law, the coverage of section 5 is even clearer. One change bars prospective independent candidates from *voting* in a party primary. (Nothing prevents a prospective independent from *running* in a party primary.) That such a provision deals with voting is shown by *Bowen* v. *Williams,* 238 Miss. 57, 117 So. 2d 710 (1960). There a provision limiting voting in a primary to those who would pledge adherence to its outcome was held not to bar a loser in the primary from running in the general election, because the statute was held to deal with voting in the primary rather than with candidacy.

A second change requires that each petitioner on behalf of an independent candidate personally sign the petition. Signing a petition to get a candidate on the ballot is the exact counterpart of voting for a candidate in a primary. Furthermore, this provision is open to the construction that handwritten signatures are required even from illiterates and, as such, clearly violates section 4 of the Voting Rights Act. 42 U.S.C. 1973b.

It need not be shown that the new provision discriminates in order to enjoin its enforcement; all that

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Amendment and the Voting Rights Act is in terms of denying or abridging the right to vote, as discussed above, the two holdings seem to amount to the same thing. Judge Grooms dissented from both holdings.

need be shown is that it deals with voting. Since at that point the federal authorities have jurisdiction, the question of what provisions do deal with voting should also be submitted to those authorities, at least in the case of provisions "arguably subject" to that jurisdiction. *Compare San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 245 (1959).

The proper relief here would have been to enjoin the elections affected by the state's enforcement of the statute. *Bush* v. *Martin,* 224 F. Supp. 449 (S.D. Tex. 1963), *aff'd,* 376 U.S. 222 (1964). Having sought such relief, appellants are now entitled to have the improperly-held elections set aside, *Hamer* v. *Campbell,* 358 F.2d 215 (5th Cir. 1966), and the use of the statute in the 1968 and subsequent elections enjoined.

CONCLUSION

House Bill No. 68 is no more than an inventive means of maintaining white political supremacy in Mississippi which has resulted from denying Negroes the vote for many years. Yet because the statute does not say in so many words that former slaves may not vote or that the state voting registrar may register whomever he pleases, it is claimed that this statute does not deal with a voting practice or procedure. Appellants submit that this sort of "extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination"[14]

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[14] *South Carolina* v. *Katzenbach,* 383 U.S. 301, 335 (1966). What this Court meant was well described by the Attorney General, testifying before the House of Representatives:

> "*Mr. Katzenbach:* The justification is simply this: Our experience in the areas that would be covered by this Bill has been such as to indicate frequently on the part of state legislatures

was precisely what Congress expected from the State of Mississippi. Mississippi should not be allowed to thwart Congress by the devious expedient of calling a spade a shovel and saying they are different.

For the reasons stated above, this Court should note probable jurisdiction and reverse the judgment of the court below.

Respectfully submitted,

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a desire in a sense to outguess the Congress of the United States. I refer, for example to the new voter qualifications that have been put into statutes of Louisiana, Mississippi and Alabama following the enactment of the 1964 Act which made things more difficult for people to vote . . . .

"The same thing was true, as the Chairman may recall, in Louisiana at the time of the initial school desegregation, where the legislature passed I don't know how many laws in the shortest period of time. Everytime the judge issued a decree, the legislature . . . passed a law to frustrate that decree." House Hearings 60.

APPENDIX

APPENDIX